IRREVOCABLE OFFERS.

I.

IT is elementary that an offer not under seal and without consideration may be revoked at any moment prior to its acceptance, even though a stated time is given for deliberation, for in the Common Law this giving of time is viewed as at most a promise to keep the offer open, which, being without consideration, is not binding. It has recently been reasserted that even an offer in terms to remain open a stated time, given under seal or for consideration, may in all cases be revoked before the time expires so as to render a subsequent acceptance ineffectual though given within the time allowed.[1]

Suppose an offer is made to sell land for $10,000, and in consideration of $50 paid by the offeree the offerer agrees to keep the offer open for ten days. It is asserted that if the offerer communicates a revocation on the third day, for instance, an acceptance thereafter, though within the ten days, will not create a contract to buy and sell the land. It is admitted, of course, that the revocation exposes the offerer to an action for damages for the breach of his contract to keep the offer open. The contention is that, while the contracted obligation to keep the offer open is wrongfully broken and the wrongdoer is liable in damages, the wrong is effectual to revoke the offer. This smacks of the exploded notion that a promissor has an alternative "right" either to perform his promise or to pay damages for his non-performance,[2]

[1] Ashley, The Law of Contracts (1911), pp. 25–27.

[2] This fallacy is a very catching one and at first blush seems a sound generalization from the fact that ordinarily only damages can be recovered for a breach of contract. It was relied upon in Lattimore *v.* Harsen, 14 Johns. (N. Y.) 330 (1817) for a result since repudiated [see also Munroe *v.* Perkins, 9 Pick. (Mass.) 298 (1830)] and was unfortunately given currency in The Common Law, p. 301, by Justice Holmes, whose statement, says Pollock, "can only be regarded as a brilliant paradox." Pollock on Contracts, 3d Am. ed., p. 202 n. (g). The law regards damages assessed against the defendant as compensation for the wrong he has done, and not as the performance of an alternative "right." Decrees for specific performance and negative injunctions show that a promisor has no such alternative. That a decree for specific performance does not get the thing done at the time promised and is really

but Professor Ashley puts the proposition in this form: An irrevocable offer "is contrary to the legal conception of an offer," [3] following Langdell, who said: "An offer . . . which the party making it has no power to revoke is a legal impossibility." [4] True, the latter did partly rest this dogmatic statement on the further assertion that "A contract incapable of being broken is also a legal impossibility," but the reason, at bottom, assigned by both authors is that no meeting of the minds results from an acceptance given after the offerer has signified his change of mind, even though by so signifying he has broken his agreement.

The error here is not a reversion to the notion that mutual assent necessary to the formation of a legal agreement means actual concordance of the inner thought or unrevealed intentions. All accept the figurative language that it is sufficient that a meeting of the minds appears in the expressions of the parties; that the law does not go behind the expressed intentions. Familiar examples are: (1) Where a change of mind is manifested by the offerer but not communicated to the offeree before the acceptance; here if the acceptance is within the time limit, express or implied, of the offer, even though there was no contract to keep it open, a contract arises. (2) So also if an offerer says what he does not mean, in terms and under circumstances that do not apprise the offeree of the discrepancy between intention and expression, a contract comprising the terms as expressed results from an acceptance. The offerer must stand by what he said, and cannot insist upon what he meant, no matter how clearly he can prove the latter. The error consists in overlooking the fact that the law may regard the wrongful revocation as unexpressed. If the law is that the wrongful revocation is entirely negligible and to be

a lame specific reparation, illustrates a common defect of remedial justice. That a negative injunction commands the defendant merely not to sing for any other employer and does not affirmatively order the defendant to sing for the plaintiff, is also a confession of the inadequacy of remedial machinery. For similar reasons society regards compensatory damages as the best practical remedy for the wrongful breaking of ordinary contracts. No one finds fault with Pollock's definition of a contract as a promise which the law will enforce. The sanction is imperfect. Nevertheless the substantive law regards one who has contracted to do something as bound to do it. Moreover the remedy is not always faulty; see, for instance, Manchester Ship Canal Co. *v.* Manchester Race Course Co., [1901] 2 Ch. Div. 37, referred to *infra*, p. 647.

[3] Ashley, The Law of Contracts (1911), p. 26.

[4] Summary of Contracts, § 178.

left out of account, the only operative expressions are the offer and the acceptance, manifesting mutual assent.

This is the sole question, does the law regard a wrongful revocation negligible? If, in breach of a contracted obligation to keep an offer open, the offerer attempts to revoke, may the "revocation" be treated by the offeree as unexpressed?

Why should mere words of revocation under such circumstances be given legal effect? The attempted revocation is not one of those *faits accomplis* which has altered the relations of the parties as a matter of fact and which courts may not ignore. If a *de facto* officer does an act affecting the rights of individuals the law may well give effect to the act, though the actor had no legal right to do it. So as to torts of a corporation committed in an *ultra vires* enterprise, the law may well say that they are the acts of the corporation, though done without right. In general, acts done beyond legal right when they have produced effects in fact must also produce legal consequence, but solely for the purpose of doing justice to the person injuriously affected, and in his behalf only. But why should mere words, wrongfully uttered, which produce no physical, material or actual effect be given legal effect and given that effect contrary to the desires and insistence of him who might be injured thereby and to effectuate the wrongful purpose of the utterer? Every one admits that a promise on a consideration to keep an offer open creates a contractual duty to keep it open; and that a revocation of such an offer would be wrong if legally operative at all. The question here, however, is not the bald one — why should he profit by his own wrong, for the admitted action for damages is a theoretical compensation for that; but the query is, why should any legal effect whatever be given to the words of revocation if the person to whom you have promised not to address them sees fit to ignore them?

If no satisfactory answer can be given to this question the supposed theoretical objection to irrevocable offer falls to the ground, and the result reached by the courts is sound in principle.

The cases are neither few nor in conflict. They are uniform to the effect that an offer under seal, where seals have not lost their efficacy, or for a consideration, is irrevocable.[5]

[5] O'Brien *v.* Boland, 166 Mass. 481, 44 N. E. 602 (1896); Seyferth *v.* Groves & S. R. R. Co., 217 Ill. 483, 75 N. E. 522 (1905); Souffrain *v.* McDonald, 27 Ind. 269 (1866);

In several of these cases[6] striking illustration is given of the theory that the attempt at wrongful revocation is entirely negligible, for in them specific performance is decreed of the contract created by acceptance given after a "revocation" had been communicated.

It has also been held that an offeree of land may enjoin a proposed sale to another, the offerer having contracted to keep the offer open, on the ground, not that the offeree had an interest in the land (being merely an offeree he could not have), but because the contract to keep the offer open implied a negative promise not to sell the land to another within the time given.[7]

The injunction in this instance is more nearly equivalent to an affirmative order to the defendant to perform his promise than negative injunctions ordinarily are; the usual futility and impolicy of attempting governmental coercion of acts of personal service are not involved. In the cases referred to in the preceding paragraph, there is in effect a double specific performance; for, before decreeing specific performance of the ultimate contract, the courts, first, in holding the "revocation" ineffectual to prevent acceptance, hold the offerer specifically to his promise to keep the offer open.

Solomon Mier Co. *v.* Hadden, 148 Mich. 488, 111 N. W. 1040 (1907); Marsh *v.* Lott, 8 Cal. App. 384, 97 Pac. 163 (1908); Tibbs *v.* Zirkle, 55 W. Va. 49, 46 S. E. 701 (1904); Rease *v.* Kittle, 56 W. Va. 269, 49 S. E. 150 (1904); Bradford *v.* Foster, 87 Tenn. 4, 9 S. W. 195 (1888); Watkins *v.* Robertson, 105 Va. 269, 54 S. E. 33 (1906); McMillan *v.* Ames, 33 Minn. 257, 22 N. W. 612 (1885); Smith *v.* Cauthen, 98 Miss. 746, 54 So. 844 (1911); Mueller *v.* Nortmann, 116 Wis. 468, 93 N. W. 538 (1903), holding death of offerer, where for a consideration he has agreed to keep the offer open, does not revoke the offer. And see Adams *v.* Peabody Coal Co., 230 Ill. 469, 82 N. E. 645 (1907).

The doctrine of the above decisions has been recognized by *dicta* in numerous cases, especially deliberate in the following: Weaver *v.* Burr, 31 W. Va. 736, 755, 8 S. E. 743, 754 (1888); Linn *v.* McLean, 80 Ala. 360, 4 So. 777 (1888); Couch *v.* McCoy, 138 Fed. 696 (1905); Mansfield *v.* Hodgdon, 147 Mass. 304, 17 N. E. 544 (1888); Cummins *v.* Beavers, 103 Va. 230, 48 S. E. 891 (1904); Willard *v.* Tayloe, 8 Wall. (U. S.) 557 (1869); Johnston *v.* Trippe, 33 Fed. 530 (1887); Peterson *v.* Chase, 115 Wis. 239, 91 N. W. 687 (1902); Frank *v.* Stratford-Handcock, 13 Wyo. 37, 77 Pac. 134 (1904); Black *v.* Maddox, 104 Ga. 157, 30 S. E. 723 (1898); Ross *v.* Parks, 93 Ala. 153, 8 So. 368 (1890); Murphy Thompson Co. *v.* Addington, 31 Ky. L. Rep. 176, 101 S. W. 964 (1907); Barnes *v.* Hustead, 219 Pa. 287, 68 Atl. 839 (1908).

[6] Souffrain *v.* McDonald, *supra*; O'Brien *v.* Boland, *supra*; Seyferth *v.* Groves & S. R. R. Co., *supra*; Solomon Mier Co. *v.* Hadden, *supra*; Marsh *v.* Lott, *supra*; Couch *v.* McCoy, 138 Fed. 696 (*semble*); and see McMillan *v.* Ames, *supra*.

[7] Manchester Ship Canal Co. *v.* Manchester Race Course Co., [1901] 2 Ch. Div. 37.

That the doctrine of irrevocable offers gives an illustration of specific enforcement that effectually gets the thing done as promised is no reproach to it. Remedial machinery need not always be inadequate.[8]

Professor Ashley says:

"Promises to convey property upon condition have been confused with contracts to keep an offer open, but they are very different. We have many instances of such conditional contracts, but contracts to continue an offer are not numerous.

"The courts frequently use language which would lead to the belief that the contract they are considering is to keep an offer open, but an examination of the facts will generally show a conditional promise to sell."[9]

It is quite true that a promise under seal or for a consideration to sell property subject to a condition to be performed by the promisee is to be distinguished from an offer to sell supplemented by a contract to keep the offer open, but it seems to be incorrect to say that the latter sort of undertaking is comparatively rare. If the common form of option contracts bears analysis as a conditional promise to sell, the doctrine of irrevocable offers would not apply. There would be a binding promise to sell enforceable upon the performance of the condition. It is to be noted that such a binding conditional promise to sell would be a unilateral contract, since if we assume a counter-promise to buy we pass from our hypothetical case of an option contract. Professor Langdell truly said:

"There is no doubt that A. may make a *binding* promise to sell certain property to B. on certain terms, while B. is left perfectly free to buy the property or not; and such a promise will, in most respects, confer the same right upon B. as if he had made a counter-promise to buy. But such a case . . . is not an offer contemplating a bilateral contract, but it is a complete unilateral contract."[10]

A.'s liability to convey is merely dependent upon the performance by B. of the designated condition, which he is free to per-

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[8] See note 2, *ante*.

[9] Ashley, The Law of Contracts (1911), p. 26.

[10] Summary of Contracts, § 179. The word "binding" is italicized by the present writer.

form or not. In order to apply this construction to the ordinary option contract it must appear that the money paid down is understood as the consideration for the promise to sell, and that the notification, within the time given, of the promisee's willingness to take the property is merely a condition or one of the conditions to the promisor's liability to perform. Where, however, the sum paid down is small, particularly when it is not an advance upon the purchase price, as it will ordinarily not be where there is no counter-promise to buy, the true construction is that it is given not as the consideration of the promise to sell but as the consideration for granting time to deliberate. The same distinction applies as to the purpose of affixing a seal to such a proposal.

Consequently it seems that the courts are right in assuming that an offer to sell within a stated time, made under seal or for a consideration, should ordinarily be construed as (1) an offer to sell, and (2) a contract to keep the offer open. Before the consideration is paid there are two offers. Thus if A. says to B.: "In consideration of your paying me $50, I agree to sell you my land within ten days for $10,000." Here is an offer to sell the land (the principal offer) and an accessory offer to keep the principal offer open for ten days. If B. accepts the accessory offer by paying the $50, an accessory contract arises to keep the principal offer open.[11]

It may be noted that in all of the cases cited above [12] the subject-matter of the offer was such that equity will specifically enforce a contract relating to it. Nevertheless it will be found that in none of them is it suggested that the irrevocability of "paid-for" offers [13] is confined to offers of such subject-matter. And while the writer has discovered very few cases involving subject-matter of such a nature that equity would not specifically enforce a contract relating to it, in which irrevocability of "paid-for" offers is

[11] This is the construction usually adopted by the courts. Of all the cases cited *supra*, in note 5, only O'Brien *v.* Boland and McMillan *v.* Ames consider the other construction.

[12] In notes 5, 6 and 7.

[13] This expression "paid-for" offer is used in the remainder of this essay as a brief though faulty equivalent of "an offer under seal, where seals retain their common law force, or one for which a consideration has been given." The word "option" is ambiguous as to whether it is "paid-for" or not; and "option-contract" has sometimes led to confusing the "paid-for" offer with the ultimate or principal contract created by acceptance of the principal offer.

either held or stated,[14] it seems that, so far as irrevocability is concerned, no sound distinction can be made with reference to the subject-matter of the offer. The alleged objection that to hold any offer irrevocable involves the making of a contract without a meeting of the minds is the same regardless of the subject-matter. If the law disregards this objection in the one case it should do so in the other, and we may accept the proposition as broadly and flatly laid down in the cases that a "paid-for" offer cannot be revoked.

Only one possible exception to this broad statement has occurred to the writer, and this is a very narrow class of "paid-for" offers, a wrongful revocation of which would be operative to prevent acceptance because an acceptance would enhance the injury caused the offeree by the offerer's breach, and needlessly increase the damages to be recovered. It seems that this will be true in some cases where the "paid-for" offer contemplates the making of a unilateral contract; that is, where the acceptance is not a counter-promise express or implied, but the doing of an act. Offers contemplating unilateral contracts are relatively rare; public offers of reward for the detection or arrest of criminals or for the return of lost property are examples of the most common use of such offers. An instance in which such an offer has been made under seal has probably never been heard of, and the express giving of a consideration for such an offer must be very rare.

It is believed by the writer, however, that there is an implied contract supported by ample consideration to keep such offers open in more cases than is commonly supposed, a point to be elaborated in the second division of this essay. The making of such an offer under seal or for consideration is entirely permissible, and the relation to it of the doctrine in hand will have at least some theoretical significance.

Suppose A. makes an offer, under seal or for a consideration, to B. of $1,000 for the drilling of a well 1000 feet deep on A.'s land, the offer making it plain that the acceptance called for is not a

[14] Simpson & Harper *v.* Sanders & Jenkins, 130 Ga. 265, 60 S. E. 541 (1908) (option to purchase shingles to be manufactured) (*semble*); Walker *v.* Bamberger, 17 Utah, 239, 54 Pac. 108 (1898) (paid-for offer to sell an option to purchase shares of mining stock; option on an option); and see Dambmann Bros. *v.* Lorentz, 70 Md. 380, 17 Atl. 389 (1889).

promise either express or implied, but the doing of the work itself, and in terms the offer is to be open for 60 days. If after 30 days, the work being not begun or only partly done and the offer therefore not yet accepted, A. notifies B. that he does not want the work done, this attempted revocation should be construed as a repudiation of A.'s contracted obligation to keep the offer open. The doctrine of Clark *v.* Marsiglia [15] is applicable. B. must heed this repudiation and stop work. A.'s liability in this case is only for the damage caused by the breach of his contract to allow B. 60 days for acceptance. Since finishing the work is the only mode of accepting the principal offer, and the rule against enhancement of damages prevents B.'s going on, we have an example where a revocation is effectual to cut off acceptance. This exception is entirely due to the rule in the law of damages that the plaintiff may not charge the defendant with consequential damages which the plaintiff might have avoided if he had acted reasonably.

"In all such cases the just claims of the party employed are satisfied when he is fully recompensed for his part performance and indemnified for his loss in respect of the part left unexecuted." [16] As Professor Williston says: "If a man engages to have work done, and afterwards repudiates his contract before the work has been begun or when it has been only partially done, it is inflicting damage on the defendant without benefit to the plaintiff to allow the latter to insist upon proceeding with the contract." [17]

The discussions of this rule requiring a repudiation to be heeded where ignoring it would needlessly enhance damages have been confined to problems in the performance of bilateral contracts, but it is evident that it equally applies in the narrow class of cases here suggested, of "paid-for" offers contemplating acceptance by some performance, though it may be that there are exceptions, even in this exceptional class, where ignoring the revocation and accepting by completing the performance will not needlessly enhance damages, to which the general rule will be applicable that a wrongful revocation is entirely negligible.

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[15] 1 Denio (N. Y.) 317 (1845).

See Professor Williston's discussion in his edition of Wald's Pollock on Contracts, pp. 348–350; Sedgwick on Damages, 9 ed., § 636 ff.

[16] This is the oft-quoted statement by the court in Clark *v.* Marsiglia, *supra*.

[17] Williston's Wald's Pollock on Contracts, p. 349.

It may be repeated that the rule requiring a repudiation to be heeded is never applicable where disregarding it would not needlessly enhance damages.[18] It is for this reason that it does not apply to a "revocation" of "paid-for" offers contemplating the making of *bilateral* contracts. Consequently in all the cases referred to above[19] of "paid-for" offers to buy or sell property, which contemplate acceptance by a counter-promise to sell or buy, the courts properly take no note of the doctrine. Where the acceptance of the "paid-for" offer is merely a promise, it is clear that acceptance will not enhance damages.

If any doubt be entertained, it will be dispelled by a momentary consideration of the nature of the right to damages and the measure of damages for the repudiation of an obligation to keep an offer open. For some purposes, for instance in taxation,[20] it might be necessary to regard the "paid-for" offeree's option as a property right and to estimate its value as a mere right to accept or reject, and this may need to be done at a time when he has not exercised his option and while it is still entirely speculative whether he will accept or not. This value in many cases is extremely difficult of ascertainment, for it is not every option that has a market value. Should any court apply this principle in measuring the damages for a repudiation of a "paid-for" offer, it would have to regard the repudiation as destroying the option-holder's property right; but this view would scarcely lead to practical results. A better rule may be borrowed by analogy from cases holding that the damages for a breach of a contract to make a contract are the profits that would have resulted from the second contract had it been concluded.[21]

Consequently whether after repudiation the offeree brings an action as for a breach of the contract to keep the offer open, or accepts the offer and sues as for a breach of the principal contract, the measure of damages will be the same. Accordingly he is free to take the latter course, that is, where the resultant con-

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[18] 2 Sedgwick on Damages, 9 ed., § 636 c; Williston's Wald's Pollock on Contracts, p. 350.

[19] Foot-notes 5, 6, 7 and 14.

[20] Not as a taxable credit of the offerer, but as the property of the offeree. *Cf.* cases cited in 34 L. R. A. (N. S.) 1221.

[21] Sedgwick on Damages, 9 ed., § 622 c.

tract is bilateral. It is not contended that, having accepted and brought the principal contract into existence, he has a right in all cases to go ahead with performance on his side and hold the other to full performance or the contract price; this will depend entirely upon the nature of the principal contract. If that ultimate contract is of the class to which the doctrine of Clark *v.* Marsiglia applies, the fact that the repudiation was announced before the contract was created seems immaterial, because the innocent party knows before he begins his performance that the other party has renounced.

Though the offeree, where the "paid-for" offer contemplates a bilateral contract, may accept after a repudiation, the question may arise whether he must do so as a prerequisite to bringing an action for damages. It is assumed above that he need not. That he must do so before suing for specific performance of the principal contract is quite clear. Logically the same is true if he sues for damages as for a breach of the principal contract. If, however, he sues as for a breach of the defendant's promise to keep the offer open, the gist of the action is the repudiation of that promise and the measure of damages is the profits that would have been gained from the prospective contract. The defendant may show that there would have been no profit, but it would not lie in his mouth to say that the plaintiff had not accepted the offer and entitled himself to a profit, if there would have been any, for the ready answer is that defendant's repudiation dispensed with acceptance by rendering it vain,[22] for in this litigation acceptance figures only as a condition to the defendant's liability for the profits, the suit not being on the ultimate contract. If the suit were for breach of the latter contract, acceptance would appear in another light, *viz.*, as an essential element to the formation of the contract sued on.

This principle that the defendant's wrongful revocation dispenses with acceptance of the principal offer as a condition precedent to his liability for breach of the contract to keep the offer open is obvious in the cases just discussed, of "paid-for" offers contemplating unilateral contracts where the rule against enhancement prevents the offeree from completing performance, for since he

[22] But see Abbott *v.* '76 Land & Water Co., 53 Pac. 445 (Sup. Ct. Cal., 1898).

cannot complete he cannot accept, completion being acceptance. Acceptance is certainly dispensed with.

Summing up: An offer under seal, where seals have not lost their efficacy, or for consideration, may be regarded as a principal offer and a contract to keep that offer open for the express or implied time given. Such an offer cannot be revoked. That is, the principle that an ordinary offer is revocable at any time before acceptance is entirely inapplicable. An attempt to recall or renounce the offer can be nothing more than a repudiation of the contracted duty to keep the offer open. If the offer contemplates a bilateral contract the offeree may ignore the repudiation and accept the offer. When he has so accepted he has whatever form of remedy would have been available to him in case of a breach of the ultimate contract. If the nature of that contract permits he may sue in equity for specific performance. In any case he has an action for damages as for a breach of the ultimate contract without putting the defendant further in default, unless in a jurisdiction where his acceptance might be construed as "keeping the contract alive for the benefit of the other party."[23]

Even without accepting, it seems that a plaintiff who is content with damages has an equally fruitful action based upon the repudiation of the contract to keep the offer open. Acceptance, however, is logically a prerequisite to suit as for breach of the ultimate contract, either for specific performance or damages.

But, excepting extraordinary cases, if the "paid-for" offer contemplates a unilateral contract, the rule against needless enhancement of damages requires the offeree to heed the repudiation and his only remedy in such case is an action for damages for the repudiation of the contract to keep the offer open.

II.

Offers Contemplating Unilateral Contracts.

Where an offer contemplates a unilateral contract, that is, where it is made in terms that call for acceptance not by a promise either express or implied but by the doing of an act or a series of acts,

[23] See the rules as to repudiation formulated in the English and Illinois cases, as discussed by Professor Williston in his edition of Wald's Pollock on Contracts, pp. 348–350.

to admit that the offer may be withdrawn of right after the act is begun, or the series of acts is partly done, would work a hardship on the offeree in many cases. It has generally been supposed, however, that in all such cases the offerer merely exercises a legal right in revoking and that consequently the offeree is without a remedy, unless it be a quasi-contractual one, which is doubtful in any case, and at most would exist only if the circumstances were such that the partial performance "enriched" the offeree. It is to be assumed that the offer is not under seal, and no consideration is expressly given to keep it open. If it should be found that a promise for a consideration, to keep such an offer open, is inferentially involved in such a proposal the principles of irrevocable offers would apply and the hardship would not exist. It is the purpose of the following discussion to ascertain whether such implied contract is made in such cases. But first the problem and its supposed difficulties should be set forth.

In Biggers *v.* Owen [24] a reward had been offered for "delivery (of the person who had committed a designated crime) to the sheriff, . . . with evidence to convict." The plaintiff delivered a woman to the sheriff. On trial before a committing magistrate the woman was discharged for want of sufficient evidence. The offer was then withdrawn. Subsequently the woman was indicted and convicted of the crime upon evidence furnished by the plaintiff. In an action to recover the reward, the Georgia court held that the plaintiff was not entitled to recover. The only reason for the decision is thus expressed: "An offer of reward is nothing more than a proposition; it is an offer to the public; and until someone complies with the terms or conditions of that offer, it may be withdrawn." The inference from the opinion is sound that there is no acceptance of such an offer until the acts called for are completed, but was the court right in its assumption that it was dealing with an ordinary revocable offer?

Opposed to Biggers *v.* Owen, on the latter point, is the opinion of Preston, J., in the Supreme Court of Louisiana. A reward was offered for the conviction of an incendiary, and plaintiffs, suing for the reward, had procured an arrest and were ready with evidence to convict; but the offer was withdrawn before conviction

[24] 79 Ga. 658, 5 S. E. 193 (1887).

and even before the evidence was given at the trial. Justice Preston, dissenting from an opinion in which the majority disposed of the case upon other grounds, said: "The prosecution having been commenced, at the instance of the plaintiffs, they acquired an inchoate right to the reward, which the defendants could not afterward defeat." [25]

Professor Williston has thus stated the problem:

"One of the most troublesome questions in regard to revocation relates to the right of an offerer to revoke an offer to make a unilateral contract after the consideration has been partly performed but before it has been completely performed. On principle it is hard to see why the offerer may not thus revoke his offer. He cannot be said to have already contracted, because by the terms of his offer he was only to be bound if something was done, and it has not as yet been done, though it has been begun. Moreover, it may never be done, for the promisee has made no promise to complete the act, and may cease performance at his pleasure. To deny the offerer the right to revoke is, therefore, in effect to hold the promise of one contracting party binding, though the other party is neither bound to perform nor has actually performed the requested consideration. The practical hardship of allowing revocation under such circumstances is all that can make the decision of the question doubtful. The only reference to the matter in the English books is in Offord *v.* Davies, 12 C. B. n. s. 748 (1862), where in the course of the argument Williams, J., asked: 'suppose I guarantee the price of a carriage to be built for a third party who, before the carriage is finished, and consequently before I am bound to pay for it, becomes insolvent, may I recall my guaranty?' The counsel replied: 'Not after the coach builder has commenced the carriage,' and Earle, C. J., added: 'before it ripens into a contract, either party may withdraw, and so put an end to the matter. But the moment the coach builder has prepared the materials he would probably be found by the jury to have contracted.' A somewhat similar suggestion is made by the Illinois Supreme Court in Plumb *v.* Campbell, 129 Ill. 101, 107, 18 N. E. 790 (1888): Appellant (the offerer) could be bound in three ways: 'First, by appellee engaging within a reasonable time to perform the contract on his part; second, by beginning such performance in a way which would bind him to complete it, and third, by actual performance.' See also Blumenthal *v.* Goodall, 89 Cal. 251, 26 Pac. 906 (1891); Los Angeles Traction Co. *v.*

[25] Cornelson *v.* Sun Mutual Insurance Co., 7 La. Ann. 345, 347 (1852). This opinion does not rest upon any principle peculiar to Louisiana law. The common-law doctrine of consideration prevails in that State.

Wilshire, 135 Cal. 654, 658, 67 Pac. 1086 (1902); Society *v.* Brumfiel, 102 Ind. 146, 1 N. E. 382 (1885).

"The difficulty with these solutions of the problem is that they fail to take into account the offerer's right to impose such conditions as he chooses in his offer. An offer conditional on the performance of an act does not become a contract by the doing of anything else, such as part performance or giving the offerer a promise to do the act. See White *v.* Corlies, 46 N. Y. 467 (1871). Nor can it be admitted that beginning performance by one to whom an offer of a unilateral contract has been made imports any promise on his part to complete the performance. The decision in Biggers *v.* Owen, *supra*, therefore, seems sound, although the result is harsh. In that case it was held that an offer of reward might be withdrawn, after the plaintiff had nearly completed the performance requested. See also Cook *v.* Casler, 87 N. Y. App. Div. 8, 83 N. Y. Supp. 1045 (1903)." [26]

The cases referred to by Professor Williston other than Biggers *v.* Owen are not cited as directly in point. They have been discussed at length in an article by Professor Ashley,[27] who makes a tentative suggestion that an equitable estoppel might sometimes be invoked as a solution of the difficulty. He suggests that the manifest injustice done the offeree by a revocation after performance has begun might be held sufficient ground to estop the offerer's revoking. He pertinently inquires, "Have we too readily acquiesced in the idea that an offer must necessarily be revocable under all circumstances?" He says, however, "certainly these cases do not fall strictly within the equitable doctrine of *estoppel in pais*, as that subject has heretofore been developed, but a doctrine somewhat analogous thereto and depending upon the same ideas would seem to be possible, even though there may be some more suitable nomenclature." Stretching the doctrine of estoppel beyond the vaguest meaning in which it is now applied will scarcely meet with approval. Moreover, Professor Ashley admits that his suggestion does not meet the two cases that he puts as most typical.

Sir Frederick Pollock has taken the problem too lightly.[28] In his last English edition he says:

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[26] Wald's Pollock on Contracts, 3 ed., p. 34, note 39.

[27] 23 HARV. L. REV. 159. See also Ashley, The Law of Contracts (1911), pp. 78–88.

[28] He refers to Professor Ashley's article as "a very ingenious exercise in legal sophistry."

"The speculative question has lately been asked at what point of time acceptance by an act is complete, and it is suggested that A. may request B. to do something, say to move a piece of furniture, for reward which A. names, that B. may do a substantial part of the work, and A. may revoke his offer at any time before the work is complete, leaving B. without a remedy, or at least any remedy on a contract. But surely the acceptance is complete as soon as B. has made an unequivocal beginning of the performance requested, a *commencement d'execution*, to use the term familiar in French law. Whether anything is payable before the whole of the work is done depends on the terms express or implied of A.'s offer on which B. acts. As a matter of fact A.'s offer will almost always be a conditional offer, and will become, on acceptance, a promise conditional on the work being done within a reasonable time and otherwise competently. Such a conditional promise is still a promise, and wholly different from a revocable offer."[29]

On just what theory the beginning of performance is an acceptance is not explained. Of course if we were discussing a case where the offer expressly called for a counter-promise as an acceptance, or was open to the inference that a counter-promise was called for, without indicating the mode of expressing the counter-promise, the beginning of performance might well be taken as the expression, or manifestation, of such promise. In that case we would be dealing with an offer contemplating a bilateral contract. By hypothesis we are concerned with a case where such an inference is excluded, the case of an offer actually contemplating a unilateral contract.

In case of doubt the courts interpret an offer as contemplating a bilateral contract. That seems to be what is meant in Offord *v.* Davies, *supra*, by the remark of Erle, C. J.: "But the moment the coach builder has prepared the materials, he would probably be found by the jury to have contracted." This, too, is the process of reasoning adopted by Justice Holmes in Martin *v.* Meles.[30] Yet offers contemplating unilateral contracts are in fact made, and the question remains, are such offers ordinarily revocable after performance has begun? For though we discard Pollock's idea that beginning performance is acceptance, is there not truth in Judge Preston's suggestion that the commencement of perform-

[29] Pollock, Principles of Contract, 8 ed., p. 26.

[30] 179 Mass. 114, 60 N. E. 397 (1901).

ance renders the offer irrevocable? Let us assume a concrete case: A. says to B., "I have had enough of your promises in the past and want no promise from you, but if you will put my sugar-house machinery in good repair I will pay you $100 for the job, and if you will begin immediately I will give you a reasonable time to complete the work."

Are there not two offers here — one, the principal offer of $100 for the repair of the machinery; another, or collateral, offer to keep the principal offer open for a reasonable time if the offeree begins work at once? The principal offer contemplates acceptance by the act of repairing the machinery, and no contract will result from it until the machinery is fully repaired. The collateral offer also contemplates a unilateral contract, the acceptance to be beginning the work at once. If the work is begun at once there is a contract to keep the principal offer open for a reasonable time. By beginning immediately the offeree has "paid-for" the offer. So if the principal offer had fixed a definite time for completing the work, the commencement of the work would be the acceptance of, and consideration for, the implied promise to keep the principal offer open for the time so fixed in it.

The offeree is thus protected by a contract to keep the offer open. Should the offerer thereafter attempt to withdraw the offer, this repudiation of his contractual obligation would give the offeree an action for damages, and it may be that in exceptional cases the offeree may ignore the repudiation, complete the performance and hold the offerer to the resulting contract.

The analysis above suggested fully accords with the intentions of the parties, as it must in order to be admissible; whether the implied contract exists depends wholly upon the intentions of the parties. That ordinarily in this sort of dealings such an implied contract is contemplated is shown by the fact that by it alone will both parties be secured the intended positions. The offerer incurs no liability on his principal offer until the work is done, not because it is a condition in a contract already made that the doing of the work is to precede payment — a bilateral contract could be made to serve equally well for that — but because the principal offer, *viz.*, to pay for the work, will not ripen into a contract at all until the whole work is done: the offerer has only given the offeree an

option to reject the principal offer or accept it by completing the act or acts called for, within the time limit.

Thus the suggested analysis nowise interferes with securing to the offerer absence from liability except upon punctual and otherwise precise performance by the offeree, the principal object in mind when an offer contemplating a unilateral contract is made. The offerer, as Professor Williston says, can impose such conditions as he pleases; he may make the time for acceptance impossibly short if that is his whim, or make the task ever so difficult in other respects, and no liability beyond what may result from a repudiation of the collateral contract can possibly arise unless the task is completed within the time and in strict compliance with all other conditions.

On the other hand, the offeree is secured the intended position. By commencing the work he is not bound to complete it. The principal offer contemplates a unilateral contract. By commencing the work the offeree has only accepted the collateral offer and paid for the option of accepting or rejecting the principal offer. He is secured the very opportunity which in such cases it is normally expected he shall have, *i. e.*, an opportunity to see whether he can accomplish the work within the allotted time and entitle himself to the contemplated compensation. In short, the analysis here suggested does not vary the position of the parties from that depicted above in the quotation from Professor Williston, with the single exception that the revocation of the offer does not leave the offeree devoid of remedy.

In the case above put, the inference that the principal offer carries with it the implied offer to keep the former open if the work is begun within a reasonable time is made easy by the explicitness of the language used, but does not the inference come clearly in less explicit cases? Take the facts of Biggers *v.* Owen, an offer of reward for delivery to the sheriff with evidence to convict. Does not the offerer fairly say that if you produce substantial results within a reasonable time, I will give you a further reasonable time to complete? In the case of offers made to the public, *i. e.*, to an indeterminate person, if X. alone makes a substantial beginning the option created would work in his behalf only, and the offer could still be withdrawn as to all others.

The inference is stronger in the sugar-house case because from

the beginning of the work the offerer is presumably being enriched. The inference of the collateral offer is purely one of fact, however, and the existence of a benefit is not a *sine qua non.* The inference can properly be drawn whenever and only when the proposition made would reasonably be taken to offer a reasonable or a stated time for performance in exchange for the commencement of it within a stated or reasonable time.

Any express or implied reservation of a right to revoke at any time will negative the inference of the implied accessory contract. If the offer reasonably construed proposes no such contract there is no justice in enforcing one against the offerer because some abnormal person has been misguided by it. An offerer is still free to impose such terms as he pleases, and he can make an offer contemplating a unilateral contract without annexing an option to it. The difficulty with the current conception is that it takes too harsh a view of the ordinary offerer, attributing to his proposal a more selfish meaning than it bears when reasonably construed, and a meaning which comes as a shock to a normal offeree, in ordinary cases.

Suppose a promise of a sum of money is made in consideration that the offeree refrain from a bad habit for five years. First the court must consider whether the offer contemplates a bilateral contract. Was it meant that the offeree should promise, either by word or act, binding himself to refrain? If not, the offer contemplates a unilateral contract; that is, that there is to be no contract to pay the money until the act called for is done. What act? Refraining for the whole period. Was the offeree to get nothing if he refrained only two years? Obviously he was to get nothing. But does that lead us to the other extreme, that if he does refrain for two years and is still refraining, the offer may be withdrawn without liability? Surely that was not in the contemplation of the parties. As Professor Ashley says, it is a lame thing to tell the offeree now that he should have made a bilateral contract. That is what the parties did not want. The offerer did not seek to bind the offeree, but to leave him free to accept or reject. The offerer, on his part, wanted only to be free, until the offeree did what he called for, from any contractual obligation to pay the money. On the other hand, it was contemplated that the offeree should have the opportunity to do it, and thereby create a contract. The

fair inference is that an implied proposal was made to keep the offer open for the designated time in consideration that the offeree commenced to refrain.

Apart from the above interpretation by which an implied promise to keep the offer open is found in some cases, there may be question as to the consideration for this promise, but surely not a serious one. The finding of the consideration, for keeping the offer open, in the act of beginning performance is soundly in accord with the doctrine of consideration if the offer reasonably bears the interpretation above put upon it. Any future act which the offeree is not otherwise legally bound to do may be consideration for a promise, whatever that act may be, if it is the act called for in exchange for the promise, *i. e.*, called for either expressly or inferentially in the light of a reasonable construction.

It has been held that a public notice that an auction is to be without reserve is an offer which is capable of acceptance by the acts of attending and bidding the highest, and while if the auctioneer refuses to knock down the goods there is no contract to sell[31] there is a contract with the auctioneer of which he commits a breach by refusing to knock them down.[32]

In short, Warlow *v.* Harrison holds that the announcement of an auction sale without reserve is equivalent to a proposal, that if you attend the sale and bid the highest, I, the auctioneer, agree to accept your offer. That is, the mere acts of attending and bidding highest are the acceptance and consideration for the auctioneer's promise. This is true only if the auction notice may reasonably be construed to contemplate those acts in that light.

So it has been held that a public announcement of train schedules is a promise-offer to run trains at the times scheduled, contemplating as acceptance and consideration the mere act of entering the station with intention of becoming a passenger, though no ticket has yet been bought.[33] This decision goes further than the American case of Sears *v.* Eastern R. R. Co.,[34] which holds that the purchase of a ticket is an acceptance of an offer to run the train at

[31] Payne *v.* Cave, 3 Term Rep. 148 (1789).
[32] Warlow *v.* Harrison, 1 E. & E. 295 (1858).
[33] Denton *v.* G. N. Ry. Co., 5 E. & B. 860 (1856).
[34] 14 Allen (Mass.) 433 (1867).

the announced time, or at least not to arbitrarily change the time of the train.[35]

Both Warlow *v.* Harrison and Denton *v.* G. N. Ry. Co. have been doubted on the ground that the proposals made to the public, under consideration in those cases, could not reasonably be construed as offers contemplating acceptances by the acts which the courts held were acceptances.[36] If the offers did call for those acts there could be no doubt of the sufficiency of those acts as consideration. It is the interpretations that are questionable, because they do not seem to square with what persons ordinarily mean by such words and conduct; whereas the analysis suggested for the situation discussed in this article seems to truly interpret the intention of the parties. The content of any offer, that is, what is actually the offer made, is in legal contemplation the meaning which the terms convey or should convey to a reasonable offeree, under the circumstances; and it is submitted that ordinarily the person to whom an offer contemplating a unilateral contract is made understands that if he undertakes the proposed task the proposer is bound to allow him a reasonable time or the stated time, if any, to complete it.

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[35] In neither of the last two cases was there a reservation by the company of a right to change the time of trains without notice, which is the common practice at the present, a practice which strips both of the cases of any practical application to-day.

[36] Pollock on Contracts, 3 Am. ed., p. 19.